A **CHRISTOPHER MARTIN BOYD**

v.

DEB BRATA DAS GUPTA

B FEDERAL COURT, PUTRAJAYA
RAUF SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEAL NO: 03(i)-1-02-2014(W)]
3 NOVEMBER 2014

ARBITRATION: *Award - Enforcement of - Whether barred by*
D *limitation - Whether arbitration award must be converted into a judgment by way of registration before execution - Limitation Act 1953, s. 6(1)(c), (3) - Arbitration Act 1952, s. 27*

LIMITATION: *Execution of judgment - Limitation of 12 years -*
E *Arbitration award - Distinction between 'registration of an arbitration award' and 'enforcement of a judgment' - Whether application for enforcement of judgment barred by limitation - Limitation Act 1953, s. 6(1)(c), (3) - Arbitration Act 1952, s. 27*

The appellant obtained an arbitration award against the
F respondent on 4 January 2000 and on 19 January 2004 obtained an order of the High Court to register the award as the judgment of the court for the purpose of enforcing the same under s. 27 of the Arbitration Act 1952 ('1952 Act'). On 14 March 2012, the appellant obtained leave to enforce the judgment pursuant to
G O. 46 r. 2 of the Rules of the High Court 1980. Subsequently, the appellant, as the judgment creditor, commenced bankruptcy proceedings against the respondent, the judgment debtor, based on the judgment dated 19 January 2004. The respondent applied to set aside the bankruptcy proceedings on the ground, *inter alia*,
H that the bankruptcy notice and the creditors' petition which were based on the arbitration award of 4 January 2000 was barred by s. 6 of the Limitation Act 1953 ('LA'). The Deputy Registrar dismissed the respondent's application and the decision was affirmed by the High Court. However, the Court of Appeal
I allowed the appeal, finding that the appellant's bankruptcy proceedings were time barred. Hence, this appeal. The main issue

in the appeal was whether the six years limitation under s. 6(1)(c) of the LA applies to the enforcement of an arbitration award or whether the 12 years limitation under s. 6(3) of the LA applies.

Held (allowing appeal with costs; setting aside decision of the Court of Appeal and reinstating orders of the High Court) Per Raus Sharif PCA delivering the judgment of the court:

(1) The appellant obtained the award on 4 January 2000. The application to register the award for the purpose of enforcing the same as a judgment of the court under s. 27 of the 1952 Act was made on 19 January 2004. This was well within the limitation period spelt out in s. 6(1) of the LA *ie*, six years. (para 10)

(2) There is a clear distinction between 'registration of an arbitration award' and 'enforcement of a judgment' that arises from the arbitration award that was duly registered as a judgment of the court, which was the subject matter of the bankruptcy proceedings. The provisions of s. 27 of the 1952 Act and s. 38(1) of the Arbitration Act 2005 are simply procedural provisions enabling an award made in consensual arbitration proceedings to be registered. In principle, unlike an order or judgment of the court, an arbitration award does not immediately entitle a successful party to levy execution against the assets of the unsuccessful party. The arbitration award must first be converted into a judgment or order of the court before the successful party can levy execution. Only upon converting the arbitration award will it be considered as a judgment or order of the court. (paras 19 & 20)

(3) The enforcement of arbitration awards must be viewed in two parts; first is the registration of the arbitration award itself as a judgment of the court and secondly, the enforcement or execution of such a judgment. The limitation period for enforcement, *ie*, the execution of the judgment of the court is 12 years as clearly prescribed under s. 6(3) of the LA. Since the award was registered as the judgment of the court on 19 January 2004, the appellant would have 12 years from the date when the award becomes a judgment of the court to enforce the said judgment. The leave application to enforce or execute the judgment on 14 March 2012 was filed well within the 12 years period. The appellant's bankruptcy proceedings

were not barred by limitation since it had commenced the action within 12 years from the date of the registration of the award as the judgment of the court. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu memperoleh award timbang tara terhadap responden pada 4 Januari 2000 dan pada 19 Januari 2004 memperoleh perintah Mahkamah Tinggi untuk mendaftarkan award tersebut sebagai penghakiman mahkamah bagi tujuan penguatkuasaannya di bawah s. 27 Akta Timbang Tara 1952 ('Akta 1952'). Pada 14 Mac 2012, perayu memperoleh kebenaran untuk menguatkuasakan penghakiman tersebut menurut A. 46 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980. Kemudian, perayu, sebagai pemiutang penghakiman, memulakan prosiding kebankrapan terhadap responden, penghutang penghakiman, berasaskan kepada penghakiman bertarikh 19 Januari 2004. Responden memohon untuk mengenepikan prosiding kebankrapan atas alasan, antara lain, bahawa notis kebankrapan dan petisyen pemiutang yang diasaskan kepada award timbang tara bertarikh 4 Januari 2000 adalah dihalang oleh s. 6 Akta Had Masa 1953 ('Akta'). Timbalan Pendaftar menolak permohonan responden dan keputusan tersebut disahkan oleh Mahkamah Tinggi. Walau bagaimanapun, Mahkamah Rayuan membenarkan rayuan, membuat dapatan bahawa prosiding kebankrapan perayu adalah dihalang oleh masa. Dengan itu, rayuan ini. Isu utama dalam rayuan ini adalah sama ada had masa enam tahun di bawah s. 6(1)(c) Akta terpakai kepada penguatkuasaan award timbang tara atau sama ada had masa 12 tahun di bawah s. 6(3) Akta digunapakai.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Rayuan dan mengembalikan semula keputusan Mahkamah Tinggi)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Perayu memperoleh award pada 4 Januari 2000. Permohonan untuk mendaftarkan award bagi tujuan menguatkuasakannya sebagai penghakiman mahkamah di bawah s. 27 Akta 1952 dibuat pada 19 Januari 2004. Ini adalah dalam tempoh masa yang diperuntukkan dalam s. 6(1) Akta iaitu enam tahun.

(2) Terdapat perbezaan yang jelas di antara 'pendaftaran award timbang tara' dan 'penguatkuasaan penghakiman' yang timbul daripada award timbang tara yang telah didaftarkan sebagai penghakiman mahkamah, yang adalah subjek perkara prosiding

kebankrapan. Peruntukan-peruntukan s. 27 Akta 1952 dan s. 38(1) Akta Timbang Tara 2005 adalah semata-mata peruntukan prosedur yang membolehkan sesuatu award yang dibuat dalam prosiding timbang tara yang dipersetujui bersama didaftarkan. Sebagai prinsip, tidak seperti perintah atau penghakiman mahkamah, award timbang tara tidak terus memberikan hak kepada pihak yang berjaya untuk mengenakan penguatkuasaan terhadap aset-aset pihak yang tidak berjaya. Award timbang tara perlu terlebih dahulu ditukar kepada penghakiman atau perintah sebelum pihak yang berjaya boleh menguatkuasakannya. Hanya selepas penukaran award timbang tara ia akan dianggap sebagai penghakiman atau perintah mahkamah.

(3) Penguatkuasaan award timbang tara mesti dipertimbangkan dalam dua bahagian; yang pertama adalah pendaftaran award timbang tara itu sendiri sebagai penghakiman mahkamah dan kedua, penguatkuasaan atau pelaksanaan penghakiman tersebut. Tempoh had masa bagi penguatkuasaan, iaitu, pelaksanaan penghakiman mahkamah adalah 12 tahun seperti yang jelas dinyatakan di bawah s. 6(3) Akta. Oleh sebab award telah didaftarkan sebagai penghakiman mahkamah pada 19 Januari 2004, perayu akan mempunyai 12 tahun dari tarikh apabila award tersebut menjadi penghakiman mahkamah untuk menguatkuasakan penghakiman tersebut. Permohonan kebenaran untuk menguatkuasakan atau melaksanakan penghakiman pada 14 Mac 2012 telah difailkan dalam tempoh 12 tahun. Prosiding kebankrapan perayu tidak terhalang oleh had masa kerana ia telah dimulakan dalam tempoh 12 tahun dari tarikh pendaftaran award sebagai penghakiman mahkamah.

Case(s) referred to:

National Ability SA v. Tinna Oils and Chemicals Ltd, The Amazon Reefer [2010] 2 All ER (Comm) 257 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 27
Arbitration Act 2005, s. 38(1)
Courts of Judicature Act 1964, s. 96
Limitation Act 1953, s. 6(1)(c), (3)
Rules of the High Court 1980, O. 46 r. 2

Arbitration Act 1950 [UK], s. 26
Limitation Act 1980 [UK], ss. 7, 24(1), 26(1)

For the appellant - Foo Joon Liang (Teh Lay Kheng & Geeta Krishna Dallumah with him); M/s Teh, Kiu & Partners
For the respondent - T Gunaseelan (Nora Hayati with him); M/s Gunaseelan & Assocs

[Editor's note: For the Court of Appeal judgment, please see Deb Brata Das Gupta v. Christopher Martin Boyd [2013] 1 LNS 1332.]

Reported by S Barathi

JUDGMENT

Rauf Sharif PCA:

Introduction

[1] On 27 January 2014, this court granted the appellant leave pursuant to s. 96 of the Courts of Judicature Act 1964, to appeal against the decision of the Court of Appeal. The leave granted was in respect of two questions namely:

> Where an arbitration award has been registered as a judgment of the High Court either pursuant to the Arbitration Act 1952 or Arbitration Act 2005, whether:
>
> (a) The limitation period under s. 6(1)(c) of the Limitation Act 1953 applies pursuant to which the arbitration award must be enforced within six years from the issuance of that award by the arbitral tribunal;
>
> or
>
> (b) The limitation period under s. 6(3) of the Limitation Act 1953 applies, pursuant to which the arbitration award may be enforced within twelve years from the date on which the arbitration award is registered as a judgment of the Court.

Background Facts

[2] On 4 January 2000, the appellant obtained an arbitration award ('award') against the respondent. Thereafter on 19 January 2004, the appellant obtained an order of the High Court to register the award as the judgment of the court ('judgment') for the purpose of enforcing the same under s. 27 of the Arbitration Act 1952.

[3] On 14 March 2012, leave was granted by the High Court pursuant to O. 46 r. 2 of the Rules of the High Court 1980 for the appellant to enforce the judgment after six years from the date of its registration. It is pertinent to note that the application for leave was opposed by the respondent. However, the respondent did not appeal against the order for leave granted by the High Court

[4] Thereafter, the appellant as the judgment creditor, commenced bankruptcy proceedings against the respondent, the judgment debtor, based on the judgment dated 19 January 2004.

At The High Court

[5] At the High Court, the respondent applied to set aside the bankruptcy proceedings on the following grounds:

(a) the bankruptcy notice dated 4 April 2012 and the creditor's petition which were based on the Arbitration Award of 4 January 2000 was barred by s. 6 of the Limitation Act 1953. The section prescribes any action for enforcing an award is six years; and since the bankruptcy proceedings was commenced after six years, the same would be invalid;

(b) the affidavit verifying the truth of the petition dated 3 May 2012 was invalid and void on the ground that a copy of the creditor's petition was not annexed to the affidavit verifying the truth of the petition;

(c) the bankruptcy notice was invalid and void on the ground that the computation of interest was not in accordance with the judgment dated 19 January 2004.

[6] The learned Deputy Registrar dismissed the respondent's application to set aside the bankruptcy proceedings. The said decision was affirmed by the High Court.

At The Court Of Appeal

[7] At the Court of Appeal, the respondent only proceeded on the issue of whether the bankruptcy proceedings were barred by limitation. After having heard the submissions, the Court of Appeal unanimously allowed the appeal.

[8] The Court of Appeal found that the appellant's bankruptcy proceedings were time barred. The Court of Appeal was of the view that the registration or transformation of the award into the judgment was nothing but a mere procedure to enforce an award. In support of this view, the Court of Appeal relied on the decision of the Court of Appeal in England in the case of *National Ability SA v. Tinna Oils and Chemicals Ltd, The Amazon Reefer* [2010] 2 All ER (Comm) 257 ('Amazon Reefer'), where it was held:

> There was a clear distinction between an arbitral award and a judgment. An arbitration agreement was in essence enforceable because of the implied contractual promise to pay an arbitral award contained in the arbitration agreement; all measures of enforcement essentially rested upon the contract. The provisions of s. 26 of the 1950 Act had to be seen in that context. They were simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. That was quite different from the pronouncement of a judgment by a court where the state through its court had adjudged money to be due.

[9] Thus, in the instant case the Court of Appeal was of the view that the date for calculation of the limitation period must then be 4 January 2000 and since the bankruptcy proceedings were filed on 4 April 2012, which was well after the six years limitation period as provided by s. 6(1) of the Limitation Act 1953, the appellant's bankruptcy proceedings were invalid.

At The Federal Court

[10] The main issue before us was whether the six years limitation under s. 6(1)(c) of the Limitation Act 1953 applies to the enforcement of an arbitration award or whether the 12 years limitation under s. 6(3) of the same Act applies. Section 6(1)(c) of the Limitation Act 1953 reads as follows:

> 6.(1) save as hereinafter provided the following action shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (c) actions to enforce an award; ...

[11] Section 6(3) on the other hand provides:

> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[12] The High Court in finding that the appellant's bankruptcy proceedings were not time barred, had applied s. 6(3) of the Limitation Act 1953, whilst the Court of Appeal in finding that the appellant's bankruptcy proceedings were in fact time barred, had applied s. 6(1) of the same Act. As stated earlier the Court of Appeal in deciding as it did, relied on the English Court of Appeal decision in *Amazon Reefer*. Thus, it is necessary for us to examine carefully what was decided in that case.

[13] In *Amazon Reefer*, National Ability SA, a Panama company, were the owners of Amazon Reefer. They chartered her to Tinna Oils & Chemical Ltd, an Indian company, under a charter party on the Gencon form dated 29 April 1995 for a voyage from Kandla to Novorossiysk. The charter party provided for the resolution of disputes by arbitration in London under English Law. Disputes arose between National Ability SA and Tinna Oils & Chemicals Ltd which were referred to arbitration in London.

[14] By awards dated 19 November 1998 and 12 October 1999, the arbitrators awarded the National Ability SA approximately US820,000, interest until the date of the award, the costs of arbitration, and interest on the costs. Meanwhile in the course of the arbitration proceedings, Tinna Oils & Chemicals Ltd, entered into a scheme of arrangement in India with Tinna Finex Ltd (TFL) under the Indian Companies Act 1956. There were proceedings between National Ability SA and Tinna Oils & Chemicals Ltd and TFL in which the High Court in Delhi held on 4 June 2008 that the proper party with the obligation to make payments under the awards was TFL and it dismissed the claim to enforce against Tinna Oils & Chemicals Ltd.

[15] Thereafter, on 14 July 2008, National Ability SA obtained an *ex parte* order before the High Court in England giving them permission under s. 26 of the English Arbitration Act 1950 to enforce the arbitration awards as judgment against Tinna Oils & Chemicals Ltd and to enter judgment in terms of the award. Tinna Oils & Chemicals Ltd subsequently applied successfully to set the *ex parte* order aside. Later on at the *inter partes* hearing, the learned High Court Judge held that the application by National Ability SA failed because it was made after six years, thus contrary to s. 7 of the English Limitation Act 1980. The English Court of Appeal held that that the limitation period of six years under s. 7

of the English Limitation Act 1980 was applicable to an application to enforce an arbitration award in the same manner as a judgment under s. 26(1) of the English Arbitration Act 1950.

[16] Aggrieved with the said decision National Ability SA appealed to the English Court of Appeal contending that the limitation period of six years under s. 7 of the English Limitation Act 1980 did not apply to an application under s. 26 of the English Arbitration Act 1950. Learned counsel representing National Ability SA argued that the procedure under s. 26 had to be viewed in two parts. It was first an application to obtain a judgment and then, once the judgment had been obtained, an application to enforce that judgment. Viewed in that sense there was no proceeding to enforce an award under s. 26, but merely proceedings to obtain a judgment. Learned counsel further argued that by its terms s. 7 of the English Limitation Act 1980 did not apply to proceedings to enforce a judgment. The provisions of s. 24(1) of the Limitation Act 1980 were relevant to the enforcement of a judgment in that an action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable. Hence, it was National Ability SA's contention that the limitation period prescribed under s. 7 of the English Limitation Act 1980 Act did not apply to proceedings to enforce a judgment under s. 26 of the English Arbitration Act 1950.

[17] The argument by National Ability SA was rejected by the English Court of Appeal. It was held that an application under s. 26 of the English Arbitration Act 1950 was a proceeding in a court of law which was an 'action to enforce an award' within the meaning of s. 7 of the English Limitation Act 1980. And s. 7 provided for a six years limitation period. Since the application by National Ability SA to enforce the award was made after six years, the application was time barred by the English Limitation Act 1980.

[18] Adverting to the specifics in relation to the instant case, with respect, we find that the Court of Appeal fell into error in finding that the appellant's bankruptcy proceedings were time barred, by virtue of s. 6(1) of the Limitation Act 1953. The Court of Appeal's reliance on the case of *Amazon Reefer* is in our view not apt and somewhat misplaced. It is trite that each case must turn on its own facts and circumstances and the scope and nature of

the legislation under scrutiny. That being said, we find that the case of *Amazon Reefer* was dealing with an application for registration of an arbitration award as a judgment of the court and the statutory limitation period relating to the same. We find that the facts in *Amazon Reefer* is straightforward in the sense that the application to enforce an arbitration award was made well after the limitation period. The arbitration award was made in 1998 and 1999, but the application to enforce them was made on 14 July 2008, which was well after the six years period.

[19] In our instant case there is no dispute that the application to register the award was made well before the expiration of the six years period. The appellant obtained the award on 4 January 2000. The application to register the award for the purpose of enforcing the same as a judgment of the court under s. 27 of the Arbitration Act 1952 was made on 19 January 2004. This was well within the limitation period spelt out in Section 6(1) of the Limitation Act 1953, ie, six years.

[20] The Court of Appeal construed the words "to enforce the award" to mean the execution of the judgment. it is our view that although the words "to enforce an award" is used in s. 6(1)(c) of the Limitation Act 1953, we do not think it applies to both the registration of an arbitration award and enforcement of an arbitration award. In our considered view, there is a clear distinction between "registration of an arbitration award" and "enforcement of a judgment" that arises from the arbitration award that is duly registered as a judgment of the court, which in our present case is the subject matter of the bankruptcy proceedings. The provisions of s. 27 of the Arbitration Act 1952 and s. 38(1) of the Arbitration Act 2005 are simply procedural provisions enabling an award made in consensual arbitration proceedings to be registered. In principle, unlike an order or judgment of the Court, an arbitration award does not immediately entitle a successful party to levy execution against the assets of the unsuccessful party. The arbitration award must first be converted into a judgment or order of the court before the successful party can levy execution. Only upon converting the arbitration award will it be considered as a judgment or order of the court.

[21] Section 27 of the Arbitration Act 1952 provides:

> An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, **judgment** may be entered in terms of the award.
> (emphasis added)

[22] Section 38(1) of the Arbitration Act 2005 provides:

> (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a **judgment** in terms of the award or by action.
> (emphasis added)

[23] Thus, it is clear from the above that once the arbitration award is registered it will take effect as a judgment of the court. We have laid emphasis to the word "judgment" in both provisions. It is abundantly clear, both provisions refers to procedures before an arbitration award is registered and converted into a judgment of the court. Both provisions had made a clear distinction between an award and a judgment. Under the circumstances, the enforcement of arbitration awards must be viewed in two parts. First is the registration of the arbitration award itself as a judgment of the court, and secondly the enforcement or execution of such a judgment.

[24] It is clear to us that when parties sought to enforce an arbitration award ie, to register it under s. 27 of the Arbitration Act 1952 or s. 38(1) of the Arbitration Act 2005 the limitation period of six years pursuant to s. 6(1)(c) of the Limitation Act 1953 applies. In the present case the award was issued on 4 January 2000 and was registered as the judgment of the Court on 19 January 2004. This was well within the six years limitation prescribed under s. 6(1)(c) of the Limitation Act 1953.

[25] It is also clear to us that the limitation period for enforcement, ie, the execution of the judgment of the court, will then be 12 years as clearly prescribed under s. 6(3) of the Limitation Act 1953. In the present case since the award was registered as the judgment of the Court on 19 January 2004, the appellant would have 12 years from the date when the award becomes a judgment of court to enforce the said judgment. In this

case the leave application to enforce or execute the judgment on 14 March 2012 was filed well within the 12 years period. Having said that and in applying the 12 years limitation period under s. 6(3) of the Limitation Act 1953 we find that the High Court was therefore correct in finding that the appellant's bankruptcy proceedings were not barred by limitation since it had commenced the action within 12 years from the date of the registration of the award as the judgment of the court.

[26] To sum up, on the questions of law posed in this appeal, it is our finding that for the registration of an arbitration award as a judgment of the High Court either pursuant to the Arbitration Act 1952 or Arbitration Act 2005, the limitation period is six years from the issuance of that award by an arbitration tribunal. As for the arbitration award which has been registered as a judgment of the court, the limitation period is 12 years pursuant to s. 6(3) of the Limitation Act 1953 to which the award may be enforced.

[27] For the above said reasons, we allow the appeal with costs. The decision of the Court of Appeal is hereby set aside and accordingly the orders of the High Court is hereby reinstated.